Supreme Court, U.S.
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Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

BILTMORE FOREST RADIO, INC., and
WILLSYR COMMUNICATIONS LIMITED PARTNERSHIP
Petitioners

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

APPENDIX for PETITION FOR WRIT OF CERTIORARI

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June 1, 1998

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APPENDIX A

ORDER OF THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT, filed March 15, 1994

BILTMORE FOREST BROADCASTING FM, INC., et al., v. FCC, ORION COMMUNICATIONS LTD., Intervenor

Case No. 92-1645, and Consolidated Cases Nos. 93-1465, 93-1466, and 93-1470,

BEFORE: Mikva, Chief Judge, Buckley and Randolph, Circuit Judges

Upon consideration of the order to show cause filed February 22, 1994, and the responses thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHERED ORDERED by the court, sua sponte, that these cases are reversed and remanded to the FCC for further consideration in light of this court's decision in Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993).

The clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely filed petition for rehearing. See, D.C. Cir. Rule 41 (a).

Per Curiam

For the Court

"s/_____".
Ron H. Garvin, Clerk

MANDATE ISSUED: May 18, 1994

APPENDIX B

MEMORANDUM OPINION AND ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION,
rel. November 29, 1995, 10 FCC Rcd 13066

ORION COMMUNICATIONS, LTD.
File No. BPH-870901ME

BILTMORE FOREST RADIO, INC.
File No. ARN-950707MD

1. The FCC has under consideration an Application for Review filed on November 10, 1994, by Biltmore Forest Broadcasting FM, Inc., Liberty Productions. a Limited Partnership, Skyland Broadcasting Company, and Willsyr Communications, Limited Partnership ("Petitioners"). Petitioners request review of the action by the Chief, Audio Services Division, by letter dated October 12, 1994, 1/ which denied a Petition for Rescission of Construction Permit ("Rescission Petition") and concluded that Orion Communications, Ltd. ("Orion") was authorized to continue to operate station WZLS(FM), Biltmore Forest, North Carolina pending further FCC action. 2/ The FCC also has under consideration an application for joint interim operating authority to operate on FM Channel 243A, Biltmore Forest, North Carolina, filed by Biltmore Forest Radio, Inc., a non-profit corporation established by and comprised of the Petitioners. 3/ The Petitioners filed the application for joint interim authorization pursuant to Section 73.3592(b) of the FCC's rules. For the reasons stated below, we will grant the Application for Review and direct the Mass

Media Bureau to study and, if appropriate, announce the acceptance of the application for joint interim operation.

BACKGROUND

2. In September of 1987, Orion and the Petitioners filed mutually exclusive applications for a construction permit for a new commercial FM station at Biltmore Forest, North Carolina. After a comparative hearing, the presiding ALJ granted Orion's application (BPH-870901ME) on May 4, 1990. National Communications Industries, 5 FCC Rcd 2862 (ALJ 1990). 4/ In December of 1993, the U.S. Court of Appeals for the D.C. Circuit issued its decision in Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993). In Bechtel, the court reversed and remanded the FCC's decision in Anchor Broadcasting Limited Partnership, 7 FCC Rcd 4566 (1992), modified, 8 FCC Rcd 1674 (1993), concluding that the integration criteria applied to mutually exclusive applicants in comparative proceedings were arbitrary and capricious and therefore unlawful. Several FCC actions that had involved use of the integration criteria and had not been finally adjudicated at the time of the Bechtel remand, including the decision granting Orion its construction permit, were subsequently reversed and remanded to the FCC for further action in light of Bechtel, effectively vacating the construction permit. Order, No. 92-1645 and consolidated cases Nos. 93-1465, 93-1466, and 93-1470 (D.C. Cir. March 15, 1994). Despite the court's March 15, 1994, reversal and remand of the Biltmore proceeding, Orion began operating WZLS(FM) pursuant to automatic program test

authority ("PTA") on July 29, 1994.5/ Petitioners filed their Rescission Petition on May 2, 1994, contending that Orion's construction permit must be rescinded. According to Petitioners, the permit is no longer a valid authorization because the court has reversed and remanded to the FCC the decision awarding Orion its permit.

3. As noted, the Bureau's October 12, 1994, letter decision denied the Rescission Petition and found that Orion was authorized to continue operating WZLS(FM) pending further FCC action. In denying the Petition, the Bureau relied on two sources. First, the Bureau relied on the August 4, 1994 Public Notice, "Modification of FCC Comparative Proceedings Freeze Policy," 9 FCC Rcd 6689 (1994) ("Public Notice"), which stated that "where program tests have already commenced [as of August 4, 1994] operations may be continued so as not to deprive the public of existing service." Second, the Bureau relied on Highlands Broadcasting Co., Inc., 9 FCC Rcd 5746 (1994). In Highlands, the FCC permitted another applicant whose construction permit grant was reversed and remanded subsequent to Bechtel to continue operating pursuant to PTA.

4. In their Application for Review, Petitioners assert that: (1) the Bureau incorrectly relied on the Public Notice because the Public Notice applies to entities who were already operating when the court remanded to the FCC the proceeding to which they were a party; (2) the Bureau mistakenly relied upon Highlands because in Highlands the entity

awarded the permit had constructed and commenced operation pursuant to PTA at the time that Bechtel was decided and several months prior to the Court's remand of the decision granting its application for construction permit; and (3) the FCC must grant joint interim operating authority to all Biltmore Forest applicants pursuant to 47 C.F.R. 73.3592 (b). Section 73.3592(b) specifies that when competing applicants have been designated for hearing the FCC may under certain circumstances consider an application for joint interim operating authority.

DISCUSSION

5. The Public Notice on which the staff relied in the decision here under review was issued for several purposes. One purpose was to clarify certain issues concerning entities granted permits in FCC decisions adopted prior to the Bechtel remand but still subject to administrative or judicial review at the time of the remand. The staff correctly noted that the Public Notice indicates that entities commencing broadcast operations prior to the August 4, 1994, date of the Public Notice could continue broadcast operations. Orion commenced operating pursuant to PTA on July 29, 1994, one week prior to the Public Notice, and therefore is technically within the parameters described by the Public Notice for continued operation. However, the Public Notice did not contemplate circumstances such as those presented here, where an applicant did not commence PTA until more than four months subsequent to the court Order reversing the grant of that applicant's permit. We therefore conclude

that the Public Notice is not a sound basis for denying the Rescission Petition.

6. Further, the staff's reliance on Highlands is misplaced. In Highlands, the FCC permitted an applicant whose application for construction permit also had been reversed and remanded by the Court of Appeals subsequent to Bechtel to continue operations pursuant to PTA. However, as noted by Petitioners. the applicant in Highlands had constructed and commenced operations prior to the court remand of that proceeding.6/ Orion, on the other hand, commenced operations months after remand. This distinction is critical because Orion clearly was on notice that its permit was no longer valid long before it completed construction. In Highlands, we specifically rejected the notion of establishing joint interim operation to ensure continued service to the public and decided, instead, that the original permittee should continue operations because it had "validly relied on an FCC grant..." Highlands, 9 FCC Rcd at 5747, para. 10. Similarly, the Public Notice contemplated circumstances where an applicant had "validly relied on a FCC grant" to construct and where, therefore, the equities weighed in favor of permitting its continued operation pending a new comparative proceeding. However, we do not believe the equities here - where Orion clearly completed construction months after learning that its authorization was not valid and where other applicants stand ready to provide service themselves - weigh in Orion's favor.

7. In sum, we conclude that, under the circumstances presented in this case, we should grant Petitioners' Application for Review and rescind Orion's permit. Given this conclusion, we also direct the staff to consider the application for joint interim operating authority to determine its acceptability and, if necessary, to notify Petitioners in writing of any deficiency. Assuming that the application is ultimately found acceptable for filing, we further direct the staff to issue a Public Notice announcing its acceptance. This Public Notice will also announce that Petitions to Deny may be filed; however, competing applications will not be accepted since competing applications for the Biltmore Forest allotment have already been filed and considered. See also, 47 C.F.R. 73.3592(b), concerning joint interim operating authority.

8. Notwithstanding our decision to rescind Orion's permit, however, termination of service to Biltmore Forest pending action on the application would not be in the public interest. See, Highlands, supra, 9 FCC Rcd at 5747, and David T. Murray, 5 FCC Rcd 5770, 5227, n.3 (1990). Accordingly, we will on our own motion grant Orion a Special Temporary Authorization ("STA") to continue operating WZLS(FM) for 180 days or until the application of Biltmore Forest Radio, Inc. is granted and Biltmore Forest Radio, Inc. is ready to commence operations, if that circumstance occurs prior to expiration of the 180 days. See, Murray, Id. /8.

CONCLUSION

9. ACCORDINGLY, IT IS ORDERED, that the Application for Review filed on November 10, 1994, by Biltmore Forest Broadcasting FM, Inc., Liberty Productions, a Limited Partnership, Skyland Broadcasting Company, and Willsyr Communications, Limited Partnership IS GRANTED to the extent indicated herein. IT IS FURTHER ORDERED that the construction permit issued to Orion IS HEREBY RESCINDED and its application, BPH-870901ME (as modified) IS RETURNED TO PENDING STATUS. IT IS FURTHER ORDERED that Orion IS HEREBY GRANTED Special Temporary Authorization for 180 days or until the Biltmore Forest Radio, Inc. application for joint interim operating authority is granted and Biltmore Forest Radio, Inc. notifies the FCC that it is ready to commence operations, whichever is sooner. The Mass Media Bureau IS DIRECTED to examine the joint application and, assuming it is acceptable, to place the application on a notice of acceptance inviting petitions to deny.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton, Acting Secretary

1/ Letter from Larry D. Eads, reference 1800B3-MFW (Chief, Audio Services Division, October 12, 1994).

2/ Orion filed an opposition to the Application for Review on November 23, 1994.

3/ Orion is not a participant to the application for joint interim operating authority.

4/ The Review Board affirmed the grant of Orion's application and denial of Petitioners' applications. National Communications Industries, 6 FCC Rcd 1978 (Rev. Bd. 1991). The FCC subsequently affirmed the decision of the Board. National Communications Industries, 7 FCC Rcd 1703 (1992), recon. denied, Liberty Productions, a Limited Partnership, 7 FCC Rcd 7581 (1992), further recon. denied, Liberty Productions, a Limited Partnership, 8 FCC Rcd 4264 (1993). The permit was modified to change the antenna supporting structure on November 2, 1993. See, (File No. BMPH-940824IF).

5/ Orion filed an application (File No. BLH-940803KD) for license to cover on August 3, 1994. Petitioners filed a Petition to Deny the application on September 2, 1994. The application remains pending.

6/ Germantown Broadcasting Corp., 9 FCC Rcd 6426 (1994), a companion case decided subsequent to Highlands, is also distinguishable from the instant case on these grounds.

7/Orion should receive a copy of all correspondence.

8/ If, for any reason, the joint interim operator is not ready for operation within 180 days, Orion may formally request extension of the STA.

APPENDIX C

MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION, rel. October 22, 1996, 11 FCC Rcd 19589

ORION COMMUNICATIONS, LTD.
File No. BPH-870901ME

BILTMORE FOREST RADIO, INC.
File No. BPIH-950707MD

1. The FCC has under consideration a petition for reconsideration ("petition") filed on January 16, 1996, by Orion Communications, Ltd. ("Orion").1/ Orion requests reconsideration of the action by the FCC which granted an application for review filed by Biltmore Forest Broadcasting FM Inc., Liberty Productions, a Limited Partnership, Skyland Broadcasting Company, and Willsyr Communications, Limited Partnership (the "Competing Applicants") and rescinded Orion's construction permit and operating authority for station WZLS(FM), Biltmore Forest, North Carolina. See, Orion Communications, Ltd., 10 FCC Rcd 13066 (1995) ("MO&O"). The MO&O also ordered the staff to consider an application for joint interim operating authority to operate on the Channel 243A allotment in Biltmore Forest filed by Biltmore Forest Radio, Inc., a non-profit corporation established by the Competing Applicants. For the reasons stated below, we deny Orion's petition and grant the application for joint interim operating authority.

BACKGROUND

2. On May 4, 1990, the FCC granted

Orion's application for a construction permit (BPH-870901ME) for a new commercial FM station WZLS(FM)) at Biltmore Forest, North Carolina.2/ On March 15, 1994, the U.S. Court of Appeals for the D.C. Circuit released an order in Biltmore Forest Broadcasting, Inc. v. FCC, reversing the FCC's grant of the WZLS(FM) permit to Orion and remanding the matter to the FCC. See Order, No. 92-1645 and Con. Cases Nos. 93-1465, 93-1466, and 93-1470, 1994 WL 116196 (D.C. Cir.). The Court's Order directed the FCC to further consider its decision which had awarded Orion its permit in light of the Court's decision in Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993). 3/ Subsequent to the reversal and remand, Orion constructed the station and commenced operations, pursuant to automatic program test authority on JULY 29, 1994. Orion filed an application (BLH-940803KD) for license to cover on August 3, 1994.4/

3. The Competing Applicants filed a "Petition for Rescission of Construction Permit" on May 2, 1994, contending that Orion no longer had a valid authorization in light of the court's action. The staff issued a letter on October 12, 1994, denying the petition and finding that Orion was authorized to continue operating WZLS(FM) pending further FCC action.5/ The Competing Applicants filed an application for review of the staff's action. On November 7, 1995, the FCC found that Orion had completed construction and commenced operations months after being on notice that the grant of its construction permit had been reversed and remanded, and under the

circumstances presented in the case, reversed the staff action and rescinded Orion's construction permit. MO&O, supra. The MO&O also directed the staff to consider the application for joint interim operating authority to determine its acceptability. The FCC also granted Orion special temporary authority to continue operating the station for a maximum of 180 days or until the application for joint interim operation is granted and the FCC is notified that operations are ready to begin.

4. Orion seeks reconsideration of the action rescinding its construction permit based on the following arguments: (1) the FCC did not provide Orion with adequate "notice" prior to Orion's construction that the permit was rendered invalid by the court's action and that no factual or legal support exists for the FCC's action rescinding the permit; and (2) the FCC has discretionary authority to maintain the status quo by permitting Orion to continue operating WZLS(FM) pending completion of the remand proceeding, and a balancing of the equities requires this result.

DISCUSSION

5. Orion maintains that there is no factual or legal support for the rescission of its permit. In support of this contention, Orion states that our conclusion that it was clearly on notice that its permit was no longer valid was both incorrect and contrary to the advice of its counsel. Orion also cites United Detroit Theaters Corp. v. FCC, 178 F.2d 700 (D.C.Cir. 1949) and Press Broadcasting Co. v. FCC, 59 F.3d 1365 (D.C. Cir. 1995) for the proposition that the FCC must

issue a separate order canceling a permit before it becomes invalid. Finally, Orion states that it constructed WZLS(FM) in the good faith belief that it was fulfilling commitments it had made to the FCC in connection with its August 23, 1993 application to modify the WZLS(FM) construction permit. 6/

6. Orion clearly was on notice that the Court had reversed the grant of its permit from the date of the Court's decision, four months before it completed construction. MO&O, at para.6. Moreover, the Competing Applicants filed a "Petition for Rescission of Construction Permit" on May 2, 1994, thereby alerting Orion that they would challenge the validity of Orion's authorization in light of the Court's reversal. Once the Court reversed the grant of Orion's construction permit, it was clearly unreasonable for Orion to construct the station. Orion suggests that it lacked notice of the invalidity of the WZLS(FM) permit in part because its counsel at the time specifically advised it that the Court's reversal "does not affect the validity" of Orion's construction permit.7/ In this regard, the advice of counsel has no legal significance with respect to the propriety of FCC action, see, Carroll, Carroll & Rowland, 4 FCC Rcd 7149 (1989), and Hillebrand Broadcasting, Inc., 1 FCC Rcd 419 (1986), and it does not persuade us to change our conclusion that it was unreasonable for Orion to construct Station WZLS(FM) after its permit grant was overturned.

7. We disagree with Orion's contention that the FCC had to take

additional action to cancel Orion's permit after the court's reversal and remand and that such action would have provided Orion with notice that it could not proceed with construction. Neither United Detroit Theaters nor Press stand for the proposition that the FCC must issue a separate order canceling a permit, where a court has reversed the FCC grant of the permit. Rather, these cases involved applications for extension of time to construct broadcast facilities and whether the authorized construction period should be extended beyond the expiration date of the permit.8/ In the instant case, Orion did not fail to complete construction within the period specified in the construction permit; rather, the decision awarding it a permit in the first instance was reversed and remanded to the FCC by the appellate court. Thus, the inherent validity of the grant authorizing Orion's construction permit, not its expiration date, is at issue. The fact that the FCC must issue an order canceling a permit if construction is not complete by the end of the specified construction period 9/ specified in the construction permit has no bearing on Orion's situation and we reject its attempt to equate two fundamentally different circumstances.

8. Finally with respect to the argument that the rescission of its permit lacks legal support, we reject Orion's contention that it constructed WZLS(FM) in good faith belief that it was fulfilling commitments made to the FCC in connection with its August 23, 1993, modification application. Without questioning Orion's good faith we cannot find that it was

reasonable for Orion to conclude that it was committed to constructing the station's facilities under the terms of its permit even after the Court had reversed the grant of that constriction permit and a request for rescission was filed. The reversal of Orion's permit grant by the Court of Appeals clearly released Orion from any "obligation" to construct the station in accordance with the representations made in connection with the modification application or the conditions on the invalidated permit.

9. Orion's next argument contends that the FCC should maintain the status quo and that Orion should be permitted to continue operating WZLS(FM) pending completion of the remand proceeding so as to avoid disruption of service. Orion claims that the circumstances in this case favor its continued operation of the station since Orion is the only one of the permittees whose grants were reversed by the court on Bechtel grounds to have its construction permit rescinded. Orion further maintains that the Competing Applicants would suffer no cognizable harm from the continued operation by Orion of WZLS(FM), but that Orion would lose its only source of income if it is forced to cease operating. Orion thus suggests that the equities of this case require that its temporary authority to operate the station be continued until all comparative proceedings are completed.

10. The FCC clearly has the discretion to maintain existing service upon Court remand pending further evidentiary proceedings in order to avoid disruption of service to the public. See,

Highlands Co. Inc., 9 FCC Rcd 5746, 5747 (1994). See also, WORZ, Inc. v. FCC, 268 F.2d 889, 890 (D.C. Cir. 1959); WEAT-TV, Inc., 45 FCC 996, 998-999 (1963). For this reason, Orion was granted special temporary authority to continue operating WZLS(FM) until the application for joint interim operating authority is granted and the interim applicants are ready to begin operation on the frequency now occupied by WZLS(FM). MO&O at para. 8. We believe that our decision in the MO&O to consider the proposal for the joint interim arrangement both ensured continuation of service to Biltmore Forest listeners and balanced the respective equities of the parties. We are not persuaded by Orion's contention that equity favors its continued operation of station WZLS(FM), given that Orion completed construction after the court had reversed and a request for rescission had been filed. We therefore will not permit Orion to continue operating under these circumstances now that we are able to approve an application for joint operating authority.10/ In this regard, we note that Orion elected not to participate as a party to the application for interim operating authority.

11. To ensure the continuation of service, we are today approving the application for joint interim operating authority.11/ Biltmore Forest Radio, Inc.'s application for joint interim operating authority was filed on July 7, 1995 and was placed on Public Notice of Acceptance on December 4, 1995. The application is unopposed. Furthermore, the application meets the requirements of

47 C.F.R. 73.3592(b) as well as the FCC's other applicable technical and legal rules, and the applicant is otherwise qualified to be interim licensee of the Biltmore Forest frequency.12/

ORDERING CLAUSES

12. ACCORDINGLY, IT IS ORDERED. That the Petition for Reconsideration, filed January, 16, 1996, by Orion Communications, Ltd. IS DENIED.

13. IT IS FURTHER ORDERED. That upon finding the applicant qualified, the Application for Joint Interim Operating Authority (BPIH-950707MD) filed by Biltmore Forest Radio, Inc. IS HEREBY GRANTED. IT IS FURTHER ORDERED, That the Special Temporary Authority granted to Orion Communications, Ltd. is extended until Biltmore Forest Radio, Inc. notifies the FCC that it is ready to commence operations.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton, Acting Secretary

1/On January 31, 1996, Biltmore Forest Radio, Inc. filed an opposition to the petition, and on February 12, 1996, Orion filed a reply to the opposition.

2/Orion's application was granted after a comparative proceeding to resolve the mutually exclusive applications filed by Orion and the Competing Applicants. National Communications Industries, 5 FCC Rcd 2862 (ALJ 1990). The Review Board affirmed the grant of Orion's application and denial of the Competing Applicants' applications. National Communications Industries, 6 FCC Rcd 1978 (Rev. Bd.

1991). The FCC subsequently affirmed the decision of the Board: National Communications Industries, 7 FCC Rcd 1703 (1992), recon. denied, Liberty Productions, A Limited Partnership, 7 FCC Rcd 7581 (1992), further recon. denied, Liberty Productions, A Limited Partnership, 8 FCC Rcd 4264 (1993). The Competing Applicants subsequently appealed the decision to the U.S. Court of Appeals for the D.C. Circuit.

3/ In Bechtel, the court reversed and remanded the FCC's decision in Anchor Broadcasting Limited Partnership, 7 FCC Rcd 4566 (1992), modified, 8 FCC Rcd 1674 (1993) concluding that the integration criteria applied to mutually exclusive applicants in that and other comparative proceedings were arbitrary and capricious and therefore unlawful.

4/ The Competing Applicants filed a Petition to Deny the application on September 2, 1994. The application remains pending.

5/ Letter from Larry D. Eads, Chief, Audio Services Division, MMB, October 12, 1994.

6/ A staff letter of September 17, 1993 stated that "...pursuant to 47 C.F.R. 73.3535 (a) you must certify that construction will commence immediately after the modification application is granted." Orion submitted such certification on October 15, 1993. The modification application was granted on November 2, 1993.

7/ See, facsimile transmission dated March 18, 1994, attached as Exhibit G to Orion's petition.

8/ In United Detroit Theaters, the

Court found that the failure to complete construction within the time specified in the permit did not cause a forfeiture of the permit where the FCC had granted a timely application for extension of time to construct. In Press, the Court found that the 24-month construction period for television stations runs from the date the permit is issued and is not tolled by any subsequent appeal of the permit grant.

9/ See MG-TV Broadcasting Co. v. FCC, 408 F.2d 1257, 1261 (D.C.Cir. 1968) (construction permit does not lapse notwithstanding failure to meet deadline, until FCC declares it forfeited).

10/ See, para. 11, infra. To prevent interruption of service, the STA granted to Orion will be extended until Biltmore Forest notifies the FCC that it is ready to commence operation.

11/ The applicants for joint interim operating authority include: Willsyr Communications, Limited Partnership, Skyland Broadcasting Company, Biltmore Forest Broadcasting FM, Inc., and Liberty Productions, a Limited Partnership ("Biltmore Forest Radio, Inc.").

12/ We recognize that adjudicatory actions, while necessary, may not be the best way to resolve competing claims for interim operating authority. If the parties should fashion a different agreement the FCC would act expeditiously on the matter.

APPENDIX D

ORDER OF THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT, filed February 27, 1997

ORION COMMUNICATIONS LIMITED v. FCC,
BILTMORE FOREST RADIO, INC., et als., Intervenors

Case No. 96-1430

BEFORE: Ginsburg, Sentelle, and Henderson, Circuit Judges

Upon consideration of the motion to dismiss, the opposition thereto, and the reply; the motion to exceed page limits; the lodged motion to a stay; the oppositions thereto, and the replies; and the motion to strike, the opposition thereto, and the reply, it is

ORDERED that the motion to dismiss be denied. The decisions of which appellant seeks review constitute final agency action; the requirements for seeking review under 47 U.S.C. 402 have been met; and appellant is not precluded by 47 U.S.C. 405 (a) from seeking judicial review of any aspect of the orders which have been appealed. It is

FURTHER ORDERED that the motion to exceed page limits be granted. The Clerk is directed to file the lodged motion for stay. It is

FURTHERED ORDERED that the motion to strike be denied. It is

FURTHER ORDERED that the motion for stay be denied. Appellant has not satisfied the stringent standards required

for a stay pending appeal. See, Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); D.C. Circuit Handbook of Practice and Internal Procedures, 68-69 (1994).

Per Curiam

DG
DS
KLH

"s/_____".

APPENDIX E

CONGRESSIONAL RECORD, U.S. Senate, p. S4249, May 8, 1997, AMENDMENT ON WZLS RADIO STATION

Mr. FAIRCLOTH. Mr. President, I have agreed not to offer an amendment to the supplemental appropriations bill regarding a radio station in my State, because I am told that a point of order may be raised against it. But, Mr. President, I will continue to probe this matter further. I intend to request documents from the FCC on this issue. Further, I think that the Commerce Committee should hold a hearing to investigate the irregularities concerning this case.

Mr. President, in 1987, Zeb Lee and his family attempted to get a new FM station license in Asheville, NC. At the time, Mr. Lee had owned and operated a successful AM station in the area for 40 years.

By all accounts, Mr. Lee has been a model citizen and a model radio station operator, this is in stark contrast to a lot of what is taking place in radio today.

In 1993, a full 6 years later, Mr. Lee was awarded the station on a temporary basis, beating out 12 other applicants. Several of his competitors were found to be unqualified. In fact, one lied about his ability to operate a station. Another lied about his heritage in order to obtain a minority preference.

Pending final approval, Mr. Lee was required by the FCC to sell his AM station and to begin constructing a new FM tower.

In reliance on the Government, he did both. A week after Zeb Lee was on the air, the FCC issued a public notice freezing all licensing proceedings affected by the Bechtel v. FCC case.

In an unusual move, in 1996, the full FCC Board reversed all previous decisions and awarded temporary operating authority to the four opponents of Zeb Lee in the original application process. The four opponents were acting as a group by this time.

Mr. President, here we are, 10 years later--and Mr. Lee is still fighting his case with the FCC. He was on the air for 3 years--only to be told by the FCC that he would now be taken off the air, once his opponents could go on.

Mr. President, this is a highly unusual case. This was the only station, affected by the Bechtel case, where the initial decision was reserved (sic) [reversed?]. Furthermore, the FCC has never issued final regulations pursuant to the Bechtel case.

And what did the four opponents who got the radio station do with the new license--they have shopped for another buyer.

The four opponents have now turned over their temporary license to a large out of state radio company.

The fact of the matter is that the opponents in the licensing process had no intention of running a radio station. They (sic) [their?] only hope was that Zeb Lee would buy them off--in other words pay "blackmail." If that did not work--and they did win the radio station--they would transfer those rights for a big profit.

Mr. President, this process is wrong. It is deeply flawed. Any bureaucratic process that takes 10 years, by itself is an outrage. But a process that bankrupts an 80 year old man is truly wrong.

If he losses the station, the end result will be that a family owned radio business, located in Asheville area for 40 years, will have lost the radio license in a deeply flawed process.

His four opponents never had any intention of operating a radio station, they only wanted to flip the license to a larger company. This is wrong, and it must stop.

Mr. President, my amendment would have provided that Zeb Lee could continue to operate his station for a period of 6 more months. This would allow the Congress to review this matter. It would allow us to get to the bottom of what the FCC is doing.

We have to make certain that this process has been fair and even handed, but quite frankly, judging from the facts, there have been serious problems with this entire issue.

Mr. President, in conclusion, I can assure all the citizens in Asheville that I will continue to pursue this matter with vigor.

APPENDIX F

ORDER OF THE CHIEF, MASS MEDIA BUREAU, FEDERAL COMMUNICATIONS COMMISSION, rel. June 2, 1997

ORION COMMUNICATIONS, LTD.
File No. BPH-870901ME

BILTMORE FOREST RADIO, INC.
File No. BPIH-950707MD

1. By Memorandum Opinion and Order, rel.November 29, 1995, the FCC rescinded the construction permit granted to Orion Communications, Ltd. ("Orion") for a new FM station on Channel 243A (96.5 mHz) in Biltmore Forest, North Carolina /1. This action was taken pursuant to an Order of the U.S. Court of Appeals for the D.C. Circuit /2 reversing and remanding the FCC order granting Orion's permit. In this opinion, the FCC also: (1) directed the Mass Media Bureau to evaluate an application for joint interim operation of the Biltmore Forest frequency pending selection of a permanent operator pursuant to new comparative proceedings in light of the court remand, and (2) granted Orion Special Temporary Authorization "to continue operating WZLS(FM) for 180 days or until the application of Biltmore Forest Radio, Inc. is granted and Biltmore Forest Radio, Inc. is ready to commence operations." 10 FCC Rcd at 13067.

2. Orion petitioned the FCC for reconsideration of that decision. In denying reconsideration on October 22, 1996, the FCC granted the application of

Biltmore Forest Radio, Inc. for joint interim operating authority. It also extended Orion's special temporary authorization to operate station WZLS(FM) "until Biltmore Forest Radio, Inc. notifies the Commission did it is ready to commence operations." Orion Communications, Ltd., FCC 96-402 (rel. October 22, 1996), at para. 13.

3. On May 30, 1997, the FCC received a letter from Donald J. Evans, Esq., providing notification that Biltmore Forest Radio, Inc. would commence operations with its interim facilities, having chosen the call letters WZRQ(FM), at 12:01 am. on June 2, 1997. The Bureau has confirmed with the FCC's Atlanta, Georgia Field Office that Orion's WZLS(FM) did not terminate operations when WZRQ(FM) went on the air on June 2, 1997.

Accordingly, IT IS ORDERED, that Orion Communications, Ltd. TERMINATE OPERATIONS IMMEDIATELY with Station WZLS(FM) on Channel 243A (96.5 mHz) in Biltmore Forest, North Carolina. IT IS FURTHER ORDERED that Orion Communications, Ltd. confirm in writing that it has in fact terminated operations and what time it did so. While the signed original of this confirmation should be filed in triplicate with the Office of the Secretary, a copy also should be sent immediately by facsimile to the Chief, Audio Services Division at (202) 418-1411 and by U.S. mail to the attorney for each of the applicants comprising Biltmore Forest Radio, Inc.

4. A copy of this order has been sent by facsimile to counsel for Orion

Communications, Ltd. and to each attorney representing the members of Biltmore Forest Radio, Inc.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief,
Mass Media Bureau

1/ Orion Communications, Ltd., 10 FCC Rcd 13066 (1995).

2/ Order, No. 92-1645 and consolidated cases Nos. 93-1465, 93-1466, and 93-1470 (D.C Cir., March 15, 1994).

APPENDIX G

CONGRESSIONAL RECORD, U.S. Senate, pp. S11308-113110, October 29, 1997, NOMINATION OF WILLIAM KENNARD TO BE CHAIRMAN OF THE FCC

Mr. HELMS addressed the Chair.

The ACTING PRESIDENT pro tempore. The Senator from North Carolina is recognized for 5 minutes.

Mr. HELMS. I thank the Chair and I thank the managers of the bill.

Mr. President, we have been working with Senator McCain and Senator Hollings and their staffs and, of course, William Kennard. I met with him for some time in my office. Mr. Kennard is the nominee to be Chairman of the FCC, as you know. Now, all of us--and I think it is fair to include Mr. Kennard--want to rectify an awkward and unjustifiable situation that has developed in the FCC process of awarding broadcast licenses. Specifically, in this case, a well-known and highly respected and popular broadcasting executive in Asheville, NC, was curiously disqualified in his application for an FM frequency in the Asheville area. There was a lot of resentment in the public about that.

What happened, Mr. President, was that this gentleman, Zeb Lee, of Asheville, and 12 other groups, had applied for the FM frequency when it became available in 1987. The FCC's comparative hearing process, in effect at that time, was used to determine which group would be the most qualified for the frequency.

Zeb Lee had run station WSKY-AM in Asheville for 46 years, during which time he did the play-by-play for about 4,000 high school football games, and by sponsoring such public interest things as an Elvis Presley concert in 1955, which I would not have listened to, but most people did want to hear it. But he made so many innovations in broadcasting that he became just a household word, in terms of his name. He is enormously popular to this day.

Well, Mr. President, in 1989, a 20-day hearing was held during which an FCC administrative law judge disqualified most of the other applicants because the judge ruled that they either lacked experience, didn't have transmitter facilities ready to go, or were basing their application purely on provisions favoring minorities--women and others. The judge found for the Lees, ruling in their favor on May 4, 1990. The judge found that the Lees were the most qualified, citing their stewardship of the AM station and Mr. Lee's commitment of involvement in the day-to-day management of the station. The FCC then favored active involvement by owners in the day-to-day operations of a radio station, as opposed to passive investors who would not be active managers. I think that is the way to go, as a former broadcaster.

In any case, Mr. President, in addition to the first ruling in favor of Zeb Lee and his people, on April 8, 1991, the FCC Review Board affirmed the administrative law judge's ruling. And then on February 28, 1992, the FCC released its first decision favoring the

Lees and a second decision also favoring the Zeb Lee application was released, I believe, on November 23, 1992. So on June 14, 1993, the FCC released a third ruling favoring the Lees.

Well, Mr. President, you might say, 'Why is Helms going to speak today talking about this nominee and this situation in Asheville, NC?.

The FCC granted a construction permit to the Lees on April 30, 1993, following which they began the construction process. So it went through a series of regulatory twist and turns in which the Lees complied with every order and requirement issued by the FCC and the administrative law judge, who stipulated that Mr. Lee must dispose of his AM station as a condition for acquiring that FM license--which Mr. Lee did. Amazingly, on June 18 of this year, the FCC which had reversed itself on June 2, forced the Lees off the air.

Zeb Lee has asked the U.S. Court of Appeals to examine the manner in which the FCC handled his application, which led to his being taken off the air. The court will shortly issue a decision in the near future.

Mr. President since April 30, 1993, the U.S. Court of Appeals in the Bechtel case of December 17, 1993, struck down the "comparative process" that had been used to determine allocations of radio and television frequencies. The court directed the FCC to come up with new comparative standards. The Lees and about 25 to 30 other people were affected by this decision.

But their cases have been frozen ever since. Additionally, a provision in the

Balanced Budget Act of 1997, which went into effect July 1, required that all radio and television frequencies be subject to auction. This provision concerned me because Zeb Lee's case and another 25 to 30 cases were in the pipeline and could be subject to auction which nobody anticipated.

I find no fault with the provision in the balanced budget legislation, but it crept in the back door on Mr. Lee and the others.

So, to get to the meat of the coconut, Mr. President, I submitted questions to Mr. Kennard through Senator Burns' Commerce Communications Subcommittee about all of this. I ask unanimous consent that the nominee's responses be printed in the Record at the conclusion of my remarks.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered. (See exhibit 1.)

[Page: S11309]

Mr. HELMS. I thank the Chair.

Senators should note that Mr. Kennard clearly feels the FCC can conduct hearings on this small group and class of applicants using new comparative criteria.

In any event, Mr. President, I then consulted and wrote to the able Chairman of the Senate Commerce, Science, and Transportation Committee, Mr. McCain, seeking assurance that Senator McCain now agrees that the provisions in the Balanced Budget Act of 1997 do not prohibit the FCC from using the comparative process in these 25 or 30 cases.

I ask unanimous consent that copies of my letter and Senator McCain's response be printed in the Record at the conclusion of my remarks.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered. (See exhibit 2.)

Mr. HELMS. I thank the Chair.

Mr. President, I have been given assurances satisfactory to me by Mr. Kennard that he will, within statute and regulation, work in good faith with me and others to resolve the problems the Bechtel decision caused.

I was very impressed when Mr. Kennard came to my office and met with me about 3 weeks ago. I appreciate his voluntary assurance that he will work with us on the Zeb Lee case. Therefore, Mr. President, I support the nomination, and I am going to ask for the yeas and nays. I hope that he will be confined unanimously by the Senate.

Exhibit I, Responses of William E. Kennard to Post-Hearing Questions Submitted by Senator Conrad Burns on behalf of Senator Jesse Helms

1. As you know, the recent budget legislation included a provision that appear[s] to require the FCC to apply auction procedures to pending applications for radio stations. These provisions were reportedly aimed at resolving the applications that have been in limbo since the Bechtel case struck down a part of the FCC's rules governing comparative license application proceedings. Please clearly state your views in response to the following questions:

a. In your opinion, is the FCC now required to apply these auction provisions to all pending application cases, or does the FCC have discretionary authority not to handle pending cases through this auction approach?

In the Balanced Budget Act of 1997, Congress required the FCC to use auctions to resolve all future comparative broadcast proceedings involving commercial stations. For pending applications, the statute states that the Commission "shall have the authority" to use auctions. The Conference Report states that this provision "requires" the Commission to use auctions for pending cases. The Commission will be determining in a rulemaking proceeding implementing the Balanced Budget Act of 1997 how it should proceed with these pending cases. The statutory language suggests that the Commission has discretion to use comparative proceedings for pending cases.

b. While most of the pending comparative cases had not gone through a hearing before an administrative law judge, and had at least an initial decision issued, a relatively small number of these cases had in fact been decided under the old rules by an ALJ and in some cases decisions made by the full Commission, although these decisions may have been on appeal. In those cases, the parties often had spent many years and hundreds of thousands of dollars to advance their applications under the old rules. Do you believe that it would be more equitable not to apply auction procedures to the cases which were far

along in the process, where the applicants had played in good faith under the old rules, and to instead have those cases decided using any existing hearing record pursuant to such special rules as the Commission might adopt for deciding them?

I do believe that the Bechtel decision has caused unfairness to many applicants who have had further processing of their applications delayed and, as a result of that court decision, will necessarily have their applications processed under new procedures. I am quite sympathetic to their predicament. That is why the FCC argued to the court in Bechtel that the court's decision should only apply to new cases. Unfortunately the FCC was not successful and the court rejected this argument. As noted above, the issue of what those procedures will be, that is, whether some or all pending applications should be auctioned or decided pursuant to some new, yet-to-be developed criteria, will be a subject of the FCC's rulemaking proceeding implementing the Balanced Budget Act of 1997. The FCC certainly may consider as part of that rulemaking proceeding any arguments that particular classes of pending applicants should be treated differently.

c. The U.S. Court of Appeals in the Bechtel case ordered the FCC to issue new comparative rules. Although the FCC never formally adopted such new rules, its staff, including your office, prepared draft rules to respond to the Court's order. Please summarize how those draft rules would have dealt with pending cases, and comment on whether those drafts might

be suitable and readily adaptable for use in resolving at least those pending cases that had reached the point where an initial decision had been issued based on a hearing record.

The FCC staff presented a draft order to the FCC earlier this year. In that draft, the staff recommended that pending hearing cases be resolved by a lottery pursuant to Section 309(i) of the Communications Act. The Balanced Budget Act of 1997 eliminated the Commission's authority to use lotteries for these cases, so the staff proposal is no longer an option.

Exhibit 2

U.S. Senate, Washington, DC, October 21, 1997.

Hon. John McCain, Chairman, Senate Committee on Commerce, Science, and Transportation, Washington, DC.

Dear John: My folks have conducted numerous discussions with your good people about the FCC treatment of Zeb Lee, a long-time Asheville broadcaster, in response to Lee's attempt to secure an FM radio station (Zeb and approximately 25 to 30 other applicants were left stranded in the regulatory process by the Bechtel court decision.)

Additionally, I understand these 25 to 30 applicants are not affected by the provision requiring the auctioning of all radio and television licenses that was included in the Balanced Budget Act of 1997, which went into effect July I of this year.

The FCC contends that it interprets this provision as giving the Commission the authority to decide whether these 25 to 30 applicants be judged on the basis of the comparative hearing process. John, I do hope that you agree that this is a proper interpretation.

Furthermore, in the future if the courts question this interpretation for these applicants, I do hope that you will reaffirm this interpretation and move related legislation swiftly through the Senate.

Many thanks, John.

Sincerely,

Jesse

U.S. Senate, Committee on Commerce, Science, and Transportation,
Washington, D.C. October 23, 1997.

Hon. Jesse Helms, U.S. Senate,
Washington, DC.

[Page: S11310]

Dear Jesse: I am aware of your concern over whether Section 3002(a) of the Balanced Budget Act would permit the FCC to use comparative hearings where mutually-exclusive applications have been filed for initial licensees or construction permits for commercial radio and television stations. As a principal proponent of this part of the legislation, I am happy to have this opportunity to respond to your question.

Section 3002(a) specifically states that, with respect to competing applications filed before July 1, 1997,

the FCC "shall have the authority to conduct" auctions. Therefore, the FCC's authority to conduct auctions in these situations is clearly and explicitly permissive, not mandatory. Moreover, the statute contains no provision affecting the FCC's existing authority to hold comparative hearings, although it does explicitly repeal the FCC's authority to conduct lotteries. Read together under long-established principles of statutory interpretation, there can be no doubt that these provisions: (1) permit, but do not require, the use of auctions to select initial licensees for commercial radio and television stations; and (2) that the FCC is (a) permitted, but not required, to use comparative hearings to select such licensees or permittees in cases where it determines that auctions should not be used, but (b) is not permitted to use lotteries to select licensees or permittees for any service.

As to the impact of legislative history (conference reports, floor statements, and other such collateral material), it is a basic tenet of statutory interpretation that where, as here, the letter of the law is unambiguous on its face, legislative history cannot be read to override it. Therefore, any such statements that appear inconsistent with the clear terms of the statute cannot be interpreted to contradict it or to call it into question.

Finally, in the unlikely event that any future court opinion misconstrues the statute, I will do whatever is necessary to secure the passage of legislation that will restate the terms of the statute as

reflected in this letter.

I sincerely trust this will answer your questions fully. I would be pleased to provide you with anything further you might wish on this issue at any time you feel it would be helpful.

Sincerely,

John McCain, Chairman.

Mr. HELMS. Mr. President, if it is in order and agreeable to the manager of this nomination, I ask for the yeas and nays.

The ACTING PRESIDENT pro tempore. Is there a sufficient second? There is a sufficient second. The yeas and nays were ordered.

Mr. HELMS. I thank the Chair. I thank the manager. I yield the floor.

Mr. McCAIN addressed the Chair.

The ACTING PRESIDENT pro tempore. For the information of the Senator from Arizona, he has about 3 1/2 minutes.

Mr. McCAIN. Thank you, Mr. President.

Mr. President, I thank the Senator from North Carolina for his cooperation on what is a very important issue with one of his constituents, and one of great importance to him. I am grateful for his cooperation and that of his staff in resolving it.

I reserve the remainder of my time.

APPENDIX H

DECISION OF THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT, decided December 19, 1997, Case No. 96-1430, 131 F.3d 176

ORION COMMUNICATIONS LIMITED v. FCC,

BILTMORE FOREST RADIO, INC., et al., Intervenors

Appeal of an Order of the Federal Communications Commission

Stephen C. Leckar argued the cause and filed the briefs for appellant. Daniel M. Armstrong, Associate General Counsel, FCC, argued the cause for appellee, with whom Gregory M. Christopher, Counsel, was on the brief. Donald J. Evans, Timothy K. Brady and Robert A. DePont were on the brief for Intervenors, Biltmore Forest Radio, Inc., et al.

Before: EDWARDS, Chief Judge, GINSBURG, and TATEL, Circuit Judges.

Opinion for the court filed by Circuit Judge GINSBURG.

GINSBURG, Circuit Judge: Orion Communications, Ltd. appeals from an order of the Federal Communications Commission rescinding Orion's interim authority to operate an FM station and granting that authority to a consortium of Orion's competitors whose license applications the Commission had previously rejected. We hold that the FCC acted arbitrarily and capriciously and we reverse the

Commission's decision.

I. Background

In 1990, after a contested hearing, an Administrative Law Judge granted the application of Orion Communications, Ltd. for a license to operate a new FM station in Biltmore Forest, North Carolina. See, National Communications Industries, 5 FCC Rcd 2862 (ALJ 1990). The Federal Communications Commission thrice confirmed that grant. See, National Communications Industries, 6 FCC Rcd 1978 (Rev. Bd. 1991); National Communications Industries, 7 FCC Rcd 1703 (1992) (denying applications for review); Liberty Prod., 7 FCC Rcd 7581 (1992) (denying petition for reconsideration). In April 1993, while rejected applicants had still further appeals pending before the Commission and this court, the FCC issued to Orion a construction permit "conditioned on the final outcome of Docket 88-577," i.e., the license proceeding, noting that "[a]ny construction pursuant to this permit prior to this docket becoming final is at the permittee's sole risk." After discovering that it could save money by leasing a tower rather than building its own, Orion asked the Commission to modify its construction permit. In November 1993 the Commission issued a second, modified permit, but only after extracting from Orion a promise to begin construction immediately.

Meanwhile, in December 1993 this court decided Bechtel v. FCC, 10 F.3d 875, in which we held that the Commission's use of the "integration" criterion in comparative hearings was arbitrary and capricious. Shortly thereafter the

Commission announced that it would "hold in abeyance the processing of applications and the adjudication of hearing proceedings .... while it considered appropriate action" in light of Bechtel. Public Notice, FCC Freezes Comparative Proceedings, 9 FCC Rcd 1055 (Feb. 25, 1994).

In March 1994, acting upon the basis of Bechtel, we reversed the orders of the Commission granting Orion's license application and denying the applications of its competitors, and remanded the entire matter to the FCC for reconsideration. See, Biltmore Forest Broadcasting FM, Inc. v. FCC, No. 92-1645 (Mar. 15, 1994). The previously rejected applicants then petitioned the Commission to rescind the construction permit it had issued to Orion.

Before ruling upon that petition the Commission on June 27, 1994 issued to Orion yet a third construction permit, this time for a broadcast station in Asheville auxiliary to the primary FM station in Biltmore Forest. Orion then completed construction of its station, began to broadcast program tests, and on August 3, 1994 applied for an operating license. The next day the Commission acted to "clarify" its earlier Public Notice; it stated that "[w]here program tests have already commenced, operations may be continued so as not to deprive the public of existing service." Public Notice, Modification of FCC Comparative Proceedings Freeze Policy, 9 FCC Rcd 6689 (Aug. 4, 1994). Because Orion had begun broadcasting before August 4, the Audio Services Division of the FCC later denied

the request of Orion's competitors to rescind its construction permit.

The rejected applicants sought reconsideration of their petition to rescind Orion's permit and also, acting as a nonprofit consortium under the name Biltmore Forest Radio Inc. (BFRI), themselves applied for joint interim operating authority. The Commission reversed the Audio Services Division and rescinded Orion's construction permit. According to the Commission, although Orion was "technically within the parameters described by the Public Notice [of August 4] for continued operation ... the Public Notice did not contemplate circumstances ... where an applicant did not commence [broadcasting program tests] until more than four months subsequent to the court Order reversing the grant of that applicant's permit." Orion Communications, Ltd., 10 FCC Rcd 13066 (Nov. 29, 1995). The Commission also instructed its staff to accept BFRI's application for joint interim operating authority pending the Commission's final grant of a license. Orion petitioned for reconsideration. The Commission denied the petition, explaining that Orion's construction of the station and commencement of broadcasting was "clearly unreasonable" in light of this court's having earlier reversed and remanded the Commission's decision granting Orion's application. See, Orion Communications Ltd., 11 FCC Rcd 19589 (Oct. 22, 1996). BFRI began broadcasting six months later, on June 2, 1997.

II. Analysis

We reverse a Commission decision

granting or denying a broadcast license only if that decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A); DirecTV, Inc. v. FCC, 110 F.3d 816, 826 (D.C. Cir. 1997). The Commission's decisions in this case clearly fail to meet even this deferential standard.

The Commission recognized that it had the "discretion to maintain [Orion's] existing service upon ... remand ... in order to avoid disruption of service to the public." See, 11 FCC Rcd 19589 (1996). In nonetheless rescinding Orion's authority to provide such service, the Commission abused its discretion and acted arbitrarily and capriciously in the following respects: The Commission (1) erroneously concluded that Orion had been "clearly unreasonable" in proceeding with construction and broadcast tests after this court, in remanding the case against Orion for reconsideration in the wake of Bechtel, had vacated the Commission's decision granting Orion's license application; (2) created an unfounded exception to the general rule announced in its Public Notice of August 4, 1994, that a station already broadcasting could continue to do so; (3) failed to follow the standards it had set for itself in 47 C.F.R. 73.3592(b), in that it considered neither the equities of the situation nor other aspects of the public interest; and (4) departed from its own recent precedent without providing a reasoned explanation for so doing.

A. Orion's Conduct

The Commission argues that this

court's remand of March 15, 1994, by vacating the Commission order granting Orion's license, served automatically to revoke Orion's construction permit and that Orion therefore acted unreasonably in continuing to build its station. Orion argues first that it acted reasonably in continuing to build its station and alternatively that the FCC had to give it notice before the revocation of its license could take effect. We agree with the first point and so need not resolve the second.

Orion reasonably inferred from the Commission's granting it a construction permit for an auxiliary station in June 1994 -- well after our decision remanding the matter of its primary license for reconsideration after Bechtel -- that its permit to construct the primary station was still valid. An auxiliary station is by its nature dependent upon there being a primary station, as the Commission's explanation accompanying its grant of the auxiliary license makes clear. Further, the grant of the initial construction permit for the primary station had conferred upon Orion the authority not only to build the station but also, without obtaining further authorization, to begin program tests, as Orion did on July 29, 1994. See, 47 C.F.R. 73.1620 (a)(1).

Orion acted reasonably not only in beginning but also in continuing to operate because the Public Notice of August 4, 1994 by its terms authorized Orion to do so. Regardless of whether Orion acted reasonably, however, we do not see how the Commission could rationally

conclude that Orion's conduct had been "clearly unreasonable." As we have seen, the Commission's staff denied BFRI's request to rescind Orion's permit precisely because it understood the Public Notice to authorize Orion's continued operation of the station. The Commission is of course at liberty to rule that its staff erred, but it cannot say in the present circumstance that Orion was clearly unreasonable to have come to the same arguably erroneous conclusion.

Nor did Orion's competitors' filing a request for rescission make Orion's operation of the station unreasonable, as the Commission now argues; if it had, then every permit-holder that began to broadcast despite continuing appeals would be acting unreasonably. The provision of service to the public would be long delayed if successful applicants were required to wait until every last appeal was resolved before beginning to broadcast.

We hold, therefore, that the Commission acted arbitrarily and capriciously in basing its decision to revoke Orion's interim operating authority in any part upon Orion's having acted unreasonably in building and operating its station.

B. Section 73.3592(b)

Section 73.3592(b) states that the Commission "may, if the public interest will be served thereby," grant interim operating authority to a coalition of "two or more" competing applicants. In its decision the Commission took the position that this section applies to this competitive license proceeding, and upon

appeal argues that 73.3592 actually requires that it authorize joint interim operation. Orion, in its reply brief, strenuously resists the notion that the regulation has any application to the present situation.

By its terms, 73.3592(b) seems to apply only to those cases in which a hearing is yet to be held. Contrary to the Commission's argument, our decision in Consolidated Nine did not extend the reach of this provision, but merely held that the Commission could not apply it to one applicant for interim operating authority while refusing to apply it to another applicant. See, Consolidated Nine, Inc. v. FCC, 403 F.2d 585 (D.C. Cir. 1968).

The Commission's new characterization of 73.3592, and its new reading of Consolidated Nine, are also inconsistent with its own recent decision permitting another broadcaster to continue operating on an interim basis after the grant of its license was reversed and remanded by this court pursuant to Bechtel. See, Highlands Broadcasting, Inc., 9 FCC Rcd 5746, 5747 (1994). In that case the Commission explained that Consolidated Nine had required the agency to conduct a further hearing after remand with new applicants and that "in the absence of those circumstances, precedent supported an order permitting the grantee to continue its existing service ....[N]othing in Consolidated Nine ... would deprive us of the discretion to allow the existing service to continue if ...termination of the service would not serve the public interest." Id. at 5747.

In any event, 73.3592(b) clearly

requires the Commission to consider the public interest in deciding whether to award joint operating authority. Thus, even if that section does apply -- a matter that we need not decide today -- the Commission was bound to consider the public interest before deciding to transfer interim operating authority from Orion to BFRI.

The Commission has stated that the public interest is not served by "withdrawing ... existing local service from its listeners or by having ... existing facilities lie fallow." Highlands Broadcasting Co.,, 9 FCC Rcd 5746, 5747 (1994); David J. Bott, 9 FCC Rcd 6426, 6427 (1994). Yet when the Commission rescinded Orion's interim operating authority, Orion was on the air and providing local service. The rescission disrupted that service, in derogation of the very interest that the Commission had sought to protect when it permitted all other stations broadcasting as of August 4 to continue doing so. BFRI was not ready to provide service when it applied for or when it received interim operating authority; indeed, it took six months to become ready, during which time the Commission looked to Orion to provide service to the public.

The Commission has also found in the past that a significant improvement in service must be counted in furtherance of the public interest. See, Western Television Co., FCC 74-753 (1974); see also, Bechtel v. FCC, 10 F.3d 875, 882 (D.C. Cir. 1993) (integration criteria invalidated for failing to advance valid goal of "pick[ing] owners who are aware of

and responsive to their communities' special needs"). Here the ALJ found that Orion's broadcasts would be produced by Zebulon Lee --- who has spent more than 50 years broadcasting in his community --- and by Lee's wife and son, who also have many years of experience working at the family's former station in Asheville. (The family sold that AM station, as the Commission required, in the expectation of receiving their FM license). The ALJ also found that Mrs. Lee planned to devote her time at the FM station entirely to public affairs and public service, "ascertaining local needs and problems" and then "plan[ning] and coordinating station public service activities and ... programs responsive to issues of concern in the station's service area." National Communications Industries, 5 FCC Rcd 2862, at 15. Both of these factors contributed to the ALJ's conclusion that Orion would "clearly ... offer the best practicable service to the public," id., at 19. Nonetheless, the Commission did not explain why --- or even whether --- it thought BFRI would better serve the public's interest in responsive programming than would Orion.

Indeed, we note that three of the four applicants in the BFRI consortium had been rejected as licensees in one way or another for lack of integrity: per the ALJ, one "lack[ed] the requisite character," another had submitted an "abjectly false" certification, and the third claimed a minority female owner whose role was merely "window dress[ing]" for the true owner's "sham" application. 5 FCC Rcd 2862 at 6, 20, n.7, 12.

The Commission has long recognized equitable factors as a component of the public interest. In RKO General, Inc., FCC 82-104 (1982), it permitted a broadcaster whose license it had revoked to keep operating pending the completion of appellate review in part because of its felt "responsibility to ensure a continuation of service to the people of the ... area; [and upon] considerations of equity and fairness with respect to the employees of the affected station."

In the current case, however, the "equities" received short shrift. In its first decision to displace Orion in favor of BFRI, the Commission stated only "we do not believe the equities here -- where Orion clearly completed construction months after learning that its authorization was not valid and where other applicants stand ready to provide service themselves -- weigh in Orion's favor." 10 FCC Rcd 13066, 13067 (Nov. 29, 1995). Upon reconsideration, the Commission elaborated only to the extent of saying that it was "not persuaded by Orion's contention that equity favors its continued operation ... given that Orion completed construction after the court had reversed and a request for rescission had been filed." 11 FCC Rcd 19589, 19593 (Oct. 22, 1996).

These abbreviated discussions entirely fail to consider any of the equitable factors that favor Orion. Orion had successfully defended its license for four years, readily rebuffing attacks launched by the rejected applicants. Indeed, Orion's license would probably have become final long before our decision

in Bechtel unsettled the matter if only the rejected applicants had not, as the Commission found, filed "repetitious" appeals, Liberty Prod., 8 FCC Rcd 4264 (1993), in order to "debat[e] matters on which [the Commission] ha[d] already deliberated and spoken." Liberty Prod., 7 FCC Rcd 7581 (1992). Nor was this court's vacatur of the Commission's order granting Orion the license prompted by any fault of Orion's; rather, it was required by our invalidation in Bechtel of the Commission's integration criterion as arbitrary and capricious. See, Biltmore Forest Broadcasting FM, Inc. v. FCC, No. 92-1645 (Mar. 15, 1994).

In addition, Orion's investment in building the station in reasonable reliance upon the Commission's conditional grant of the construction permit, of a modification in November 1993, and of an auxiliary permit in June 1994, weighs in favor of permitting Orion to continue operating until the license is finally granted. The Commission gave no weight to Orion's reliance interest on the ground that, when it initially sought the construction permit, Orion had accepted the risk that it would not get the license. True, but irrelevant. The risk that Orion accepted was that in the end it would not get the permanent license to operate. Based upon prior Commission practice, Orion reasonably expected that it could stay on the air at least until the Commission made a final decision in the matter -- which it is yet to do. Even now Orion appeals only the rescission of its interim operating authority; Orion still bears the risk that it willingly

accepted, namely, that it will not finally be awarded the license.

The Commission's decision would, of course, be entitled to our deference had it reached a reasoned conclusion that the public interest factors favoring the award of interim operation authority to BFRI outweigh the public interest considerations favoring Orion's continued operation. As indicated above, however, the Commission's decision was based solely upon its misapprehension that Orion had behaved unreasonably. The resulting tilt in the Commission's weighing of the equities and its woefully partial consideration of the other components of the public interest make its decision arbitrary and capricious.

C. The Public Notice

The Commission acted arbitrarily in distinguishing Orion's situation from the situation contemplated in its Public Notice of August 4, 1994, which permitted then-operating stations to continue broadcasting. The only difference identified by the Commission is that Orion, unlike most other stations, did not begin operating until after the Commission had issued the freeze order of February 25, 1994, and we had remanded the challenge to its license in March 1994. As discussed above, however, the Commission erred in drawing an unfavorable inference from Orion's actions. Indeed, the Commission can hardly claim that the initial freeze order put Orion on notice that it should not begin broadcasting: if the first order had been clear, then the Commission would not have had to issue another order for the express purpose of

clarifying it.

D. Commission Precedent

The decision under review is also inconsistent with the Commission's previous decisions in Highlands and Bott. In Highlands the Commission stated that the public interest would be served by maintaining the status quo after we had, in light of Bechtel, reversed and remanded the Commission's licensing decision. See, Highlands Broadcasting Co., Inc., 9 FCC Rcd 5746 (1994). Although the Commission now attempts to distinguish Highlands on the ground that the licensee in that case had began broadcasting before the remand, it fails to explain how that difference is relevant here. Even if the Commission had justified rescinding Orion's license as necessary in order to avoid benefitting the incumbent operator during the proceedings on remand -- as the Commission now suggests it should have done -- that rationale would seem to apply equally to an incumbent that had begun operating before the remand.

Nor can the Commission distinguish its decision in Bott from the decision under review. There as here the initial licensee did not begin broadcasting program tests until after the remand. The Commission nonetheless permitted the licensee to remain on the air until the Commission reached a final decision. See, Bott, 9 FCC Rcd 6426 (1994).

Although the Commission is not necessarily bound by its prior decisions, particularly in cases where it must weigh the public interest and the equities in an individualized fashion, the Commission is bound to provide an explanation when it

departs from a clear precedent. Here the Commission provided no such explanation of its prior inconsistent decision in Bott, which compels the conclusion that the Commission acted arbitrarily and capriciously in this case.* See, New Orleans Channel 20, Inc. v. FCC, 830 F.2d 361, 366 (D.C. Cir. 1987).

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* In a footnote to its initial decision rescinding Orion's permit the Commission did attempt to distinguish Bott on the ground that the licensee in that case had begun operating before the remand. See, Orion Communications, Ltd., 10 FCC Rcd 13066, 13067 n.6 (1995). Commission counsel now acknowledges, however, that "[u]pon a closer review of the facts in Bott" that case "is not in fact distinguishable" on this ground. Perhaps that is why upon reconsideration of its decision regarding Orion the Commission failed even to mention Bott. See, Orion Communications, Ltd., 11 FCC Rcd 19589 (1996).

E. Undue Delay

This matter has been before the Commission for a long time -- ten years since the license applications were filed -- and still the Commission has not finally settled upon a licensee. In addition to reinstating it as the interim licensee, therefore, Orion asks us to order the Commission to expedite its final selection process. That we will not do, in part because the Congress has recently enacted legislation relevant to the timing of the Commission's final decision.

Section 3002 of the Balanced Budget Act of 1997, P.L. 105-33 (Aug. 5, 1997) provides that, in any pending case involving mutually inconsistent license applications (such as this one) that has not been settled by February 1, 1998, the FCC may auction off the license. The Commission has represented to the court that it plans to act promptly to implement this legislation; specifically, the Commission has said it would commence rulemaking in November 1997 and adopt a Report and Order in January 1998. We take the Commission at its word.

III. Conclusion

The Commission rescinded Orion's interim operating authority upon the erroneous premise that Orion had acted unreasonably in completing construction of and starting to operate its station. The Commission acted without regard to equitable considerations favoring Orion, other components of the public interest, or its own recent precedents. We therefore remand this matter to the Commission with instructions to reinstate Orion forthwith as the interim licensee pending such further proceedings as the Commission may conduct in order to choose either an interim or a final licensee. The Order under review is therefore

Reversed.

APPENDIX I

ORDER OF THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT, filed January 14, 1998

ORION COMMUNICATIONS LIMITED v. FCC, BILTMORE FOREST RADIO, INC., Intervenor

Case No. 96-1430

BEFORE: Edwards, Chief Judge, Ginsburg and Tatel, Circuit Judges

Upon consideration of appellant's motion for immediate issuance of mandate, the responses thereto, appellant's reply, intervenor's motion to strike the reply, the response thereto and the reply, it is

ORDERED that the motion to strike is denied. It is

FURTHERED ORDERED that the motion for issuance of mandate is granted. The Clerk is directed to issue the mandate of the court forthwith.

Per Curiam

FOR THE COURT: Mark J. Langer, Clerk

"s/_____".
BY: Robert A. Bonner, Deputy Clerk

MANDATE ISSUED: January 14, 1998

APPENDIX J

ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION, FCC 98-4, rel. Jan. 16, 1998

ORION COMMUNICATIONS, LTD.
File Nos. BPH-870901ME and BMPH-930824IF

BILTMORE FOREST RADIO, INC.
File Nos. BPIH-950707MD and
BMPIH-961218IA

By the Commission: Chairman Kennard abstaining.

1. On January 14, 1998, the U.S. Court of Appeals for the D.C. Circuit entered its mandate reversing and remanding Orion Communication Limited v. FCC, Case No. 96-1430 (Slip Op., decided December 19, 1997) ("Orion"). By this Order, we take actions implementing the mandate of the Court.

2. In Orion, the Court instructed the FCC to reinstate Orion Communications, Ltd. ("Orion") as the operator of a new FM Station on Channel 243A in Biltmore Forest, North Carolina, on an interim basis. On January 15, 1998, Biltmore Forest Radio, Inc. ("BFRI") filed with the FCC a motion to stay our action pending court review of BFRI's Emergency Motion to Recall Mandate and Stay Further Proceedings. We have reviewed BFRI's motion and conclude that it does not meet the requisite showing. See, Wisconsin Gas Co. v. FERC, 758 F.2d 669 (1985); Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (1977); Virginia Petroleum

Jobbers Association v. FPC, 259 F.2d 921 (1958). Accordingly, we hereby ORDER that BFRI's current authority to operate on Channel 243A in Biltmore Forest, North Carolina, as joint interim operator, IS TERMINATED and the authority of Orion Communications, Ltd. to operate on Channel 243A in Biltmore Forest, North Carolina IS REINSTATED 1/.

3. In order to ensure an orderly transition and uninterrupted service to Biltmore Forest, North Carolina, we hereby, on our own motion, GRANT Special Temporary Authority ("STA") to Biltmore Forest Radio, Inc. to continue to operate on Channel 243A in Biltmore Forest, North Carolina, until 12:01 a.m. on January 17, 1998. At that time, the STA hereby granted to BFRI shall automatically expire and Orion may resume operations.

4. Orion's authority to operate as interim operator on Channel 243A in Biltmore Forest, North Carolina, will expire upon notification to the Commission that the successful applicant for permanent authority for that frequency is ready to commence operations.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas, Secretary

1/ On April 16, 1997, Orion filed an Application for Review of the FCC's action granting a modified construction permit to BFRI (File No. BMPIH-961218IA). Because our action today rescinds BFRI's operating authority, we hereby dismiss Orion's Application for Review as moot.

APPENDIX K

ORDER OF THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT, filed January 16, 1998

BILTMORE FOREST RADIO, INC. v. FCC

Case No. 98-1026

BEFORE: Edwards, Chief Judge, Ginsburg and Tatel, Circuit Judges

Upon consideration of appellant's emergency motion for stay, it is

ORDERED that the motion is denied. The Commission's order of January 16, 1998, was issued pursuant to the mandate of this court and is in complete accord therewith.

Per Curiam

FOR THE COURT: Mark J. Langer, Clerk

"s/_____".
BY: Robert A. Bonner, Deputy Clerk

APPENDIX L

ORDER OF THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT, filed March 2, 1998

ORION COMMUNICATIONS LIMITED v. FCC, BILTMORE FOREST RADIO, INC., et al., Intervenors

Case No. 96-1430

BEFORE: Edwards, Chief Judge, Ginsburg and Tatel, Circuit Judges

Upon consideration of intervenor's petition for rehearing filed February 2, 1998, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT: Mark J. Langer, Clerk

"s/_____".
BY: Robert A. Bonner, Deputy Clerk

APPENDIX M

ORDER OF THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT, filed March 2, 1998

BILTMORE FOREST RADIO, INC. v. FCC
Case No. 98-1026

Before: EDWARDS, Chief Judge, and GINSBURG and TATEL, Circuit Judges.

Upon consideration of Appellant's Response to Order to Show Cause why this case should not be dismissed, this appeal is dismissed. All the issues raised in BFRI's response either were raised and answered in, or are logically precluded by, our opinion in Orion Communications, Limited v. FCC, 131 F.3d 176 (1997).

Insofar as the Appellant argues that Orion's interim operating status is unlawful under regulations of the FCC, either because Orion failed to file an application for interim operating authority or because it is operating for profit, our prior opinion makes clear that Orion is entitled to conduct interim operations for the reasons therein given.

Insofar as the Appellant argues that the FCC failed to allow BFRI a reasonable amount of time to terminate its operations, we note that our prior opinion directed the FCC to act "forthwith"; the FCC did not abuse its discretion, therefore, in acting as expeditiously as it did. Similarly, insofar as the Appellant argues that the FCC abused its discretion in failing to institute a procedure to consider other interim applicants, our prior opinion specifically

gave the FCC discretion to decide whether to institute a new selection process for interim operation or to allow Orion to keep operating until the FCC chose a final licensee.

As for BFRI's argument that Orion is not financially qualified to be an FCC licensee, we note that the FCC refused to reopen the record to consider this argument in 1992 not only because the motion to do so was untimely but also because that motion did not present such substantial likelihood of proving its allegations as to require further hearings." See, Liberty Productions, 7 FCC Rcd 7581 (1992). Nothing material has changed. An applicant is considered financially qualified so long as it possess a source of funds - either its own money or a bank loan - with which to operate. BFRI does not allege that Orion will likely be unable to pay its bills, but alleges only that Orion may now be using revenues from its station to do so. Because the FCC determined that Orion was prepared to meet its expenses before it regained control of the station (and the revenue therefrom), it is clear that Orion met then and continues to meet the financial requirements.

Finally, the Appellant's argument that Orion is "not legally qualified" because of the "intervention and influence" of various United States Senators is frivolous and cannot be the sole point raised in an appeal.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See, D.C. Rule 41.

Per Curiam.

FOR THE COURT:

Mark J. Langer, Clerk

BY: "s/_____".
Robert H. Bonner
Deputy Clerk

APPENDIX N

ORDER OF THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT, filed March 31, 1998

WILLSYR COMMUNICATIONS, LIMITED PARTNERSHIP v. FCC, ORION COMMUNICATIONS LIMITED, Intervenor

Case No. 98-1060

BEFORE: Edwards, Chief Judge, Ginsburg and Tatel, Circuit Judges

Upon consideration of appellant's motion to recuse panel and response to the order to show cause of March 2, 1998, it is

ORDERED that the motion to recuse is denied. It is

FURTHERED ORDERED that the order to show cause is discharged. It is

FURTHER ORDERED that this appeal is dismissed.

The Clerk is directed to withhold issuance of the court's mandate pursuant to Circuit Rule 41 (a)(1).

Per Curiam

FOR THE COURT: Mark J. Langer, Clerk

"s/_____".
BY: Robert A. Bonner, Deputy Clerk

APPENDIX O

ARTICLE III OF THE U.S CONSTITUTION

> Section 1. The Judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time establish.

APPENDIX P

FIFTH AMENDMENT TO THE U.S CONSTITUTION

> No person ... shall be deprived of ... liberty, or property, without due process of law.

APPENDIX Q

47 U.S.C. 455 (a)

DISQUALIFICATION OF JUSTICE, JUDGE, OR MAGISTRATE

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned.

APPENDIX R

5 U.S.C. 706 (2)

SCOPE OF REVIEW

The reviewing court shall:

(2) hold unlawful and set aside agency action, findings, and conclusions found to be:
(A) arbitrary, capricious, an abuse abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure as required by law;
(E) unsupported by substantial evidence; or
(F) unwarranted by the facts to the extent that the facts are subject to a trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the record as a whole or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

APPENDIX S

47 C.F.R. 73.3592 (b)

CONDITIONAL GRANT

When two or more applications for the same AM, FM or TV assignment have been designated for hearing, the FCC may, if the public interest will be served thereby, make a conditional grant to a group composed of any two or more of the competing applicants, such grant to terminate when the successful applicant commences operation under the terms of a regular authorization. No conditional grant will be made unless all of the competing applicants have been afforded a reasonable opportunity to participate in the group seeking the conditional grant. In its application, the group shall include a special showing as the need for the service pending operation by the successful applicant under the terms of a regular authorization; the effect, if any, of a grant on the position of any applicant which is not a member of the group; and any other factors which are deemed pertinent to the public interest judgment.